

Eisgruber's House of Lords

By JEREMY WALDRON*

IN THE UNITED States, if a judge does not approve of a statute passed by a state or federal legislature, he can refuse to apply it to the case in front of him. Other judges may disagree with him of course, and if they are in courts superior to his, the fact that they do not share his disapproval may mean that the legislation is enforced after all. But if enough judges at a high enough appellate level disapprove of the statute, it will cease to be applied. (We may abbreviate this condition by saying "If a majority of justices on the United States Supreme Court disapprove of the statute. . .," though I should emphasize that that is only an abbreviation: often the matter is settled at the level of the Circuit Courts of Appeal because the case is not appealed to the Supreme Court or because the Supreme Court chooses not to consider it.) When this condition is satisfied, the statute will be, as we sometimes say carelessly, "struck down."¹ It will become a dead letter on account of judicial disapproval, irrespective of the breadth and intensity of the support it commands in the legislature or among the electorate.

Some people—I am one of them—find this feature of the American Constitution distressing on democratic grounds.² Why should a statute, duly enacted by our elected representatives, be set at naught just because a number of judges disapprove of it—judges who are not electorally accountable to those whose lives are affected by their decisions? Christopher Eisgruber, however, refuses to participate in what

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1. As a matter of fact, a United States court has no power to remove a law from the statute books. Indeed, dissenting judges sometimes threaten to apply a statute in later cases, despite its having been "struck down" by a majority of their brethren. *See, e.g.,* the closing words of Justice Scalia's dissent in *Dickerson v. United States*, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting).

2. The classic concern is expressed by the phrase "The Counter-Majoritarian Difficulty" in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962). For more recent discussions, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154–76 (1999) and JEREMY WALDRON, *LAW AND DISAGREEMENT* 211–312 (1999).

he calls—I think a little unkindly—“hand-wringing about the ‘counter-majoritarian’ character of the judiciary.”³ He denies that there is a democratic problem with American-style judicial review. Democracy, he says, is not the same thing as “government by voters,”⁴ and there is no reason in the theory of democracy why power should be concentrated in a legislative body.⁵ In fact he makes a very bold argument. He describes federal judges as “representatives of the people,”⁶ and he claims that the moral judgments they make about legislation—what I referred to earlier as their approval or disapproval—are an indispensable part of a healthy and flourishing democracy.⁷

Some readers will be annoyed by my use of the language of “moral approval” and “disapproval” to describe judicial review in the United States. Judges, they will say, do not strike down statutes because they disapprove of them. They strike them down because they determine that the statutes in question are incompatible with the terms of the United States Constitution⁸ or with the doctrine that has grown up around it. The judges are making a legal not a moral judgment. So—my readers will say—the institution of judicial review is to be defended not in terms of the indispensability of moral judgment in a healthy democracy but on the rather different ground of the rule of law.⁹

However, the interesting thing about Professor Eisgruber’s book is that he refuses to make this move. He says at the very beginning of *Constitutional Self-Government*: “I deny that the Supreme Court’s power of judicial review depends upon the Court’s legal expertise.”¹⁰ This does not mean that the constitutional text has no role to play in Eisgruber’s argument; but in his account its role does not affect what I said in my opening paragraph about the element of moral approval and disapproval. Professor Eisgruber’s view of constitutional interpretation is that the abstraction or ambiguity of much of the language that we find in the constitutional text is exactly what invites moral judgment. The Constitution more or less instructs those who apply it

3. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 65 (2001).

4. *Id.* at 62.

5. *See id.* at 19.

6. *Id.* at 3.

7. *See id.* at 5.

8. Or sometimes a state constitution. But I shall concentrate on the argument about the United States Constitution.

9. This, of course, is the classic account in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); I refer to the argument developed towards the end of Chief Justice Marshall’s opinion. *See id.* at 176–80.

10. EISGRUBER, *supra* note 3, at 3.

to make their own judgments about such things as what searches and seizures are unreasonable, what process is due, what punishments are cruel, what bail is excessive, and what counts as the equal protection of the laws. Eisgruber follows a line of argument quite close to Ronald Dworkin's "moral reading" of the Constitution to show that judges would be failing in their duty if they did not make the moral judgments that the constitutional text instructs them to make on matters such as these.¹¹ The most important function of the actual text of the Constitution, according to Eisgruber, is not to tell us what moral judgments to make, but to define the areas where moral judgments are required: The constitutional text marks the seriousness of certain issues; it distinguishes them from others where specifically moral judgment is not held to be so necessary; and it does all this in a way that cannot easily be altered by those who find the requirement of moral judgment burdensome or inconvenient.¹² Equally, Professor Eisgruber denies that the special role of the judiciary in the American system has anything to do with their doctrinal expertise. *Stare decisis* has its uses, he says,¹³ but knowledge of the law is not what entitles judges to strike down legislation. On the contrary, the ability to manipulate precedents is often a distraction from the more important business of moral judgment: "Too often judges attempt to justify controversial rulings by citing ambiguous precedents, and too often judges veil their true reasons behind unilluminating formulae and quotations borrowed from previous cases."¹⁴ The important thing is that moral judgments be made—moral judgments, not legal judgments—in the areas where the Constitution says that they are to be made.

"[W]e should interpret the Constitution's ambiguous moral and political concepts as requiring Americans to exercise their own best judgment about the matters to which those concepts refer."¹⁵ This speaks generally of "Americans." Why then should it be the moral judgments of members of the federal judiciary that prevail? It's not a matter of moral expertise, says Professor Eisgruber, any more than it's a matter of legal expertise; judges are no more morally insightful than the rest of us.¹⁶ But Eisgruber's position is that if final decisions in

11. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–12 (1996).

12. See EISGRUBER, *supra* note 3, at 41–42.

13. See *id.* at 69.

14. *Id.* at 70.

15. *Id.* at 40.

16. See *id.* at 57.

these areas are left to the legislators or the voters, they are likely to shy away from moral judgments, and make judgments based on self-interest instead. The arithmetic of voting makes ordinary citizens irresponsible when they are in the polling booth, and the anonymity of voting means that they can vote their pocketbook even when they know that they ought to be voting morally. And legislators are no better; professional office-seekers, they are terrified of offending the voters and so they are subject indirectly to exactly the pressures that drive ordinary voters away from moral thinking and moral decision. Judges, however, are in a more favorable position. It is easier for them, says Eisgruber, to act on their moral convictions. "By guaranteeing judges prestige, a good salary, and life tenure, Americans insulate them from forces that often tempt reasonable people to mistake self-interest for moral principle."¹⁷

But if members of the judiciary are making moral judgments, what guarantee is there that their moral judgments will be congenial to the people they represent? Now we have to be careful here. The question is not, "What guarantee is there that the judges' moral judgments will be the same as those that the people would have made?" because the people may make a fake moral judgment as a cover for the pursuit of self-interest. The question is: "What guarantee is there that the judges' moral judgments will be the same as those that the people would make if the people were making genuine moral judgments?" The answer is that there is no guarantee. People differ about morality¹⁸ and moral judgment is bound to be controversial.¹⁹ The most we can hope for, says Eisgruber, is that the judges's call will not be too far out of the mainstream of moral controversy. And that hope is secured, he reckons, by the way in which judges are appointed:

Though the justices are not chosen by direct election, they are nevertheless selected through a process that is both political and democratic. . . . [T]hey are chosen by elected officials: they are nominated by the president and confirmed by the Senate. . . .

The justices have what I shall call a democratic pedigree: they owe their appointments to their political views and their political connections as much as (or more than) to their legal skills.²⁰

This indirect democratic pedigree affects the quality of their decisions. Judges, says Professor Eisgruber, are unlikely to be "moral radi-

17. *Id.* at 60.

18. *See id.* at 47-48.

19. *See id.* at 59.

20. *Id.* at 4.

cals.”²¹ The way they are chosen more or less guarantees their “conformity to mainstream conceptions of political justice.”²² So by leaving the final say on certain issues to people who have been appointed in this way, and whose conditions of employment leave them little to hope for or fear from popular majorities, we make it much more likely that issues on which moral judgment is called for will be decided on moral grounds, and indeed on moral grounds that resonate with the American people.

There is a lot of this that I agree with. Professor Eisgruber, in my opinion, succeeds in rebutting originalist and naive textualist approaches to the United States Constitution.²³ He is right, I think, in arguing that moral judgments—judgments about justice, for example, and about the rights that people ought to have against one another—are inescapable in constitutional law.²⁴ And if he were to make the case—which in the book he rather assumes than argues for—that many of the issues on which the Constitution instructs us to make moral judgments are issues on which sound politics requires moral judgment, I would be inclined to agree with that too. What I don’t agree with, however, is Professor Eisgruber’s association of this last point with a defense of the role that the judiciary plays in the American system. I don’t believe that the people and their representatives are necessarily bad at making moral arguments, and I don’t believe that the American judiciary have shown that they are particularly good at it.

I.

To begin, I should like to ask: In what sense is Professor Eisgruber’s case a defense of *judicial* review of legislation? Certainly, his argument is oriented to a familiar controversy about the role of judges in the American system. But there doesn’t seem to be anything specifically judicial in the kind of review that Eisgruber envisages. We have already seen that he refuses to base his argument on anything about judges’ legal expertise. And the points made in the previous section, about the importance of life tenure and the indirectly democratic character of the appointments process, and about the relation of all that to a distinctive form of principled deliberation—these points read more like a defense of something like an unelected legislative

21. *Id.* at 65.

22. *Id.* at 66.

23. *See id.* at 25–35.

24. *See id.* at 52–56.

chamber, than like a defense of the powers of a court. Eisgruber's account of the value of judicial review and its role in a modern democracy reads like an argument in favoring of instituting a legislative assembly that would be dedicated specifically to discussing issues of principle. It reads like an argument favoring something along the lines of the modern House of Lords in the United Kingdom.

Let me explain what I mean. The House of Lords as a legislative chamber²⁵ consists of 570 "life peers" and (since the reforms of 1999) a rump of about a hundred hereditary peers and bishops.²⁶ Let's ignore the hereditary and ecclesiastical rump and concentrate on the life peers, who are now the overwhelming majority. Life peers are appointed by decision of elected officials,²⁷ so, like Eisgruber's judges, they have an indirect democratic pedigree to guarantee that their views are not too far from the mainstream. And, like Eisgruber's judges, they are appointed for life; once appointed they cannot be removed from the House of Lords. Appointed and subject to these conditions, they can vote on legislation that has been enacted by the elected part of the British legislature.²⁸ And their vote is valued by many, precisely because they are in a position to express their views on matters of principle without the fear of electoral retribution or the hope of further political favor which sometimes intimidate members

25. I must emphasize that I am talking in the text about the House of Lords as a legislative chamber. The House of Lords as a legislative chamber is importantly distinct from its appellate committee, which serves as Britain's highest court (also referred to as the House of Lords). The appellate committee consists of Lords of Appeal, who are judges appointed to the House specifically for this purpose. There are binding conventions that members of the House other than the Lords of Appeal may not sit or vote on the appellate committee, and that the House as a whole always approves the appellate committee's recommendations. For an account of the House of Lords in its judicial capacity, *see generally* ALAN PATERSON, *THE LAW LORDS* (1982). *See also infra* text accompanying note 35.

26. For the modern composition of the House of Lords, *see* House of Lords Briefing, Analysis of Composition, at <http://www.publications.parliament.uk/pa/ld/ldinfo/ldanal.htm> (last accessed August 9, 2002). For the legislation that recently reformed it, *see* House of Lords Act, 1999, c. 34 (Eng.). Section 1 of that Act provides simply that "[n]o-one shall be a member of the House of Lords by virtue of a hereditary peerage," while section 2(2) provides for the small rump of hereditary peers (down from 630 to 90) mentioned in the text.

27. They are appointed by the Queen, under the Life Peerages Act, 1958, 6 & 7 Eliz. 2, c. 21, § 1 (Eng.). Like all decisions by the Queen, these decisions are made on the binding advice of the Prime Minister, who also determines the overall balance of numbers in the Lords, as between Labor, Conservative, Liberal-Democratic and Independent life peers. *See* O. HOOD PHILIPS ET AL., *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 177-78 (8th ed. 2001).

28. *See infra* note 34 and accompanying text for an important qualification.

of the elected House of Commons.²⁹ That's the sort of thing that Professor Eisgruber seems to be arguing for.

Should he be alarmed by this analogy? The Britishness of it is not supposed to be an embarrassment. (I could have made much the same point by comparing Eisgruber's argument to the case that might be made for an unelected Senate:³⁰ an unelected second chamber whose members were appointed for life by elected officials would seem to have many of the characteristics that Eisgruber values.³¹ But I am not accusing Professor Eisgruber of arguing for the repeal of the Seventeenth Amendment!) It is odd, though, that having made a case of this kind—for an unelected body with life tenure whose members can be expected to discuss the principled elements of legislative decisions—Eisgruber makes no effort to relate it to his book's discussion of the British constitution or to recent debates in Britain about the appropriate legislative role for a body like the House of Lords. Instead he talks simply about “the British model of an omnipotent national Parliament,”³² noting in an aside that “the House of Lords has relatively little power to constrain the Commons.”³³ Now, on the question of ultimate power, he is right. The Lords' power has been limited since 1911 by the Parliament Acts: the Lords cannot prevent the passage of money bills, nor of any bill presented to them in successive sessions of Parliament.³⁴ It would be a mistake, however, to see the House of Lords—particularly the reformed House of Lords—as a political nothing. On the contrary, with the greater legitimacy secured by the exclusion of the hereditary element, principled debates among its life peers are likely to have greater rather than less effect in day-to-day legislative politics in Britain.

29. See JOHN WELLS, *THE HOUSE OF LORDS: FROM SAXON WARLORDS TO A MODERN SENATE* 255–72 (1997).

30. The Canadian Senate, for example, is a wholly appointed body. See MEG RUSSELL, *REFORMING THE HOUSE OF LORDS: LESSONS FROM OVERSEAS* 52–54 (2000).

31. Compare with Hannah Arendt's suggestion that the United States Supreme Court fulfills the function allocated in classic republican theory to the Senate. See HANNAH ARENDT, *ON REVOLUTION* 200 (Penguin Books 1990) (1963).

32. EISGRUBER, *supra* note 3, at 19.

33. *Id.* at 94.

34. See Parliament Act, 1911, 1 & 2 Geo. 5, c. 13, §§ 1(1), 2(1) (Eng.); Parliament Act, 1949, 12, 13, & 14 Geo. 6, c. 103, § 1(a) (Eng.). But these provisions are seldom invoked. Since 1911, there have been four occasions on which legislation has been passed in this way, over opposition by the House of Lords, and only one occasion since 1949. By contrast, between 1979 and 1987 the Lords inflicted ninety-nine defeats on government bills, and in almost all these cases the bills were amended to accommodate the objections of the Upper House. See COLIN TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT, CASES AND MATERIALS* 412–13 (3d ed., 1995).

Now, of course, Eisgruber says nothing about any of this, because his topic is *judicial* review, not bicameralism; and in terms of judicial review he thinks of Britain as an anomaly in relation to a world-wide trend.³⁵ But I am saying that although his topic is judicial review, the case that he makes for it has nothing to do with the judiciary. It is an argument for a certain sort of law-making process and as such it might lead as easily—in a moment I shall argue that it leads more easily—to the conclusion that what we need is an unelected second or third chamber for our legislature to sponsor and facilitate moral debate, undistracted by the vicissitudes of electoral politics. To repeat: the case that Professor Eisgruber makes is essentially a legislative case. He says it is important that moral judgment should play a prominent part in law-making in certain areas. Legislation should not be enacted in those areas without due weight being given to the moral issues that such legislation raises. So, says Eisgruber, we should ensure that the mechanisms by which our laws are made include a place and a procedure for this moral deliberation. Since he believes that electoral politics tends to crowd out moral judgment, he is arguing in effect for a non-elective element in our legislative process.

This impression—that Eisgruber is making a case for a moral element in the legislative process—is reinforced by his description of the Supreme Court (in virtue of his conception of its role) “as a sophisticated kind of representative institution.”³⁶ Eisgruber believes in democracy, and given that direct democracy is impossible,³⁷ like any good democrat he wants us to be bound only by laws that are made by our representatives. But as well as elected representatives, he figures

35. See EISGRUBER, *supra* note 3, at 22. Professor Eisgruber says nothing in his book about the role played by British courts in the exercise of the powers established in the Human Rights Act, 1998, c. 42 (Eng.). The Act's coming into effect means that there is now judicial review of legislation in the United Kingdom. Courts in Britain now have the authority—which they never had before—to scrutinize a statute and, if they find that its provisions are incompatible with the rights laid down in the European Convention of Human Rights, they can make a formal declaration of that incompatibility. See *id.*, § 4(1)–(2). True, the Act says that such a declaration “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given,” *id.*, § 4(6)(a), and this distinguishes British judicial review from the American practice. Still, a declaration of incompatibility does have a legal and constitutional impact. On the basis of a declaration of incompatibility, a minister may amend the offending legislation by order-in-council to remedy the violation of Convention rights, see *id.*, § 10(3)–(5); this is a power the minister would not have in the absence of the process of review that led to the declaration in the first place. It is odd that Professor Eisgruber makes no mention of this, not even in a paragraph where he argues that “Britain itself no longer conforms fully to the British model.” EISGRUBER, *supra* note 3, at 77.

36. EISGRUBER, *supra* note 3, at 48.

37. See *id.* at 80.

that we also need *unelected* representatives in the law-making process, representatives whose relation to us is such that it is relatively easy for them to insinuate our (or their) moral views into politics. He acknowledges that it seems like an odd form of representation. The individual voter is unlikely to be able to shake the hand of his representative on the federal bench, or get an answer to any mail that he sends them. But this is increasingly true of elected representatives as well: the handshake usually comes anonymously and at a price, and the answers to mail are almost always drafted by an intern.³⁸ We must be realistic about the modern mechanisms of politics, says Eisgruber: "At the national level in the United States, legislation and adjudication are both professionalized forms of policy-making"³⁹

I know, of course, that we should not make too much of a fetish of words like "legislative" and "judicial." Sometimes they refer to institutions and sometimes they refer to functions. In functional terms, the legislative function is whatever goes into the process of law-making whether it is performed by the institution we call the legislature or not. (So, for example, when Eisgruber says that his book rests on a "contrast between judicial politics and legislative politics,"⁴⁰ we need not read him as denying my characterization of his argument. He is contrasting the politics of legislative assemblies—the institutions we call "legislatures"—with the politics of the institutions we call federal courts, when both are involved in the function of legislation.) Moreover, we know that the American Constitution is a system, not of pure separation of powers, but of checks and balances, so that various institutions have, besides their own proper functions, what Madison called "partial agency in" the functions of another.⁴¹ (For example, besides his main executive functions, the President performs a legislative function in signing or vetoing legislation; and besides its main legislative functions, the Senate performs judicial functions in regard to impeachments and executive functions in regard to the approval of ambassadors.) So in principle, there is no difficulty with assigning a legislative role to an institution that is called a court, or to an institution whose main function is judicial rather than legislative. Eisgruber insists, throughout *Constitutional Self-Government*, that we must take a realistic rather than a purely theoretical view of our political system.⁴²

38. See *id.* at 82.

39. *Id.*

40. *Id.* at 98.

41. THE FEDERALIST NOS. 47–48 (James Madison).

42. See EISGRUBER, *supra* note 3, at 18–20.

Our arguments should be pragmatic:⁴³ we should be interested in the mechanisms of all kinds that make up the complex and convoluted process by which our laws are enacted, and not be too worried about their abstract characterization.⁴⁴

All this is fine, and I don't want to rest anything in my argument on the abstract formalism of the point that Eisgruber is justifying an essentially legislative role for what is usually regarded as a judicial institution. But it is worth asking how the (legislative) role that Eisgruber wants to assign to the courts sits with the (judicial) role that is usually conceived as its main function. Does the one interfere with the other? Also, there is such a thing as institutional competence. Have we set up the institution in a way that is oriented towards the practical exigencies of the one role (say, the judicial role), so that it is less suited to the other role (the legislative role), however admirable in principle its discharge of the second role might be?

These are questions that are raised acutely by Eisgruber's argument for judicial review. For the Supreme Court, we know, functions rather in the way that a court functions, using the mechanisms and procedures of a court, even when it is reviewing legislation—that is, even when what it is doing (on Eisgruber's characterization) does not require its specifically legal or forensic expertise. Is there anything about this institutional characterization that makes it less likely that the court will engage in moral deliberation or help focus the moral views of the citizens on the great issues of principle that the country faces? The questions would not be so acute, were he arguing openly for a second and unelected legislative chamber on the model of the modern House of Lords. For such institutions can set themselves up as legislatures, with procedures and input appropriate to the general consideration of legislation, undistracted by the mechanisms of the court room. True: the British House of Lords also operates as an appellate court. But there are robust fire walls that insulate both the procedures and personnel involved in its legislative deliberations from the quite different procedures and personnel involved in the work of its appellate committee.⁴⁵

43. *See id.* at 72.

44. *See id.* at 82–83.

45. *See supra* note 25.

II.

As a matter of fact, it is Professor Eisgruber himself who raises the point about institutional competence. Having presented his case for the importance of moral deliberation on certain issues in politics, Eisgruber makes the following observation:

Judges take up constitutional issues in the course of deciding controversies between particular parties. As a result, those issues come to them in a way that is incomplete . . . [N]ot all interested parties will have standing to appear before the court. Judges receive evidence and hear arguments from only a limited number of parties. To be sure, modern rules of civil procedure help to accommodate the need for multiple-party suits, and non-parties may be able to express their views in an *amicus* brief. Still, most constitutional cases are structured around an argument between two opposing parties. As a result, judges may not have the information necessary to gain a comprehensive perspective on the fairness of an entire social, political, or economic system.⁴⁶

He concludes from this that it is probably unwise for judges to attempt to address issues that turn on what he calls “comprehensive” moral principles. They should confine their attention instead to issues of “discrete” moral principles, principles that have relatively narrow ambit and operate rather like side-constraints on particular aspects of governmental practice.⁴⁷ The distinction between “comprehensive” and “discrete” is not entirely clear, but he says that “[w]hat matters is whether the principle calls for assessment of an entire system of social interaction or whether it instead proscribes specific forms of government action.”⁴⁸

Now it is important to see how this fits into the structure of the overall case that Professor Eisgruber is making. Eisgruber is not saying that comprehensive moral principles are less important than discrete moral principles; nor is he saying that it is less important that the issues that implicate comprehensive moral principles be discussed in moral terms. If anything, the scale of these issues—the very thing that makes them unfit for determination by a court—ought to make it more important that they not be consigned to a forum where interest rather than morality prevails. What Eisgruber is acknowledging, however, is that the urgent need for moral deliberation on these issues is not answered by the capacities of judicial institutions. “[W]here the moral principle at stake is itself comprehensive, so that the crucial

46. EISGRUBER, *supra* note 3, at 173.

47. *See id.* at 165.

48. *Id.* at 171.

questions are about complex trade-offs over an entire system of relationships, it is hard to see how the case-specific structure of adjudication can be anything except a handicap."⁴⁹ To put it another way, Eisgruber's discussion of the distinctive features of courts in the passage we have just considered cannot be read as an answer to my challenge in section I of this paper, to show why his argument is an argument for *judicial* review rather than for an unelected legislative assembly. An unelected legislative body, operating as a second or third chamber, would not have the drawbacks of binary structure and limited sources of information that handicap courts in their dealings with moral issues. In other words, the fact that Eisgruber wants to entrust moral issues to courts makes it less likely, not more likely, that comprehensive issues will be discussed competently in appropriately moral terms, than it would be if we entrusted them, say, to something like a modern House of Lords. Thus Eisgruber is not saying that there is anything distinctive about judicial institutions (compared with other non-elective institutions) that makes them particularly adept at or appropriate for addressing moral issues. His discussion of the distinctive features of the judicial institution he favors—the United States Supreme Court—is used instead to explain why it cannot satisfactorily complete the task—the task that he said was so important—of ensuring that moral issues will be discussed in moral terms.

What if we focus, though, just on the issues that implicate what Eisgruber calls discrete moral principles? Can a case be made that courts—bodies with the particular competence of judicial institutions—are especially good at dealing with these? Some have thought so. Michael Moore argues, for example, that

judges are better positioned for this kind of moral insight than are legislatures because judges have moral thought experiments presented to them everyday with the kind of detail and concrete personal involvement needed for moral insight. It is one thing to talk about a right to privacy in general, another to order a teenager to bear a child she does not want to bear. One might well think that moral insight is best generated at the level of particular cases, giving judicial beliefs greater epistemic authority than that possessed by legislative beliefs on the same subject.⁵⁰

In one or two places, Professor Eisgruber gestures at an argument along these lines. He says that "[b]ecause adjudication spotlights harms that result from particular misuses of government power, it

49. *Id.* at 173–74.

50. Michael S. Moore, *Law as a Functional Kind*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 188, 230 (Robert P. George ed., 1992).

reduces the risk that discrete moral principles will be traded off against generalized benefits.”⁵¹ In fact, however, the particularity of the cases that come before the Supreme Court tends to be lost sight of by the time they make their way up to that elevated level, and the justices seem to have no more difficulty than any other policy-maker in rebutting claims on the basis of generalized trade-offs, parades of horrors, and other considerations which, if they are moral at all, completely transcend the particularity of the issues between the appellant and the respondent.

Eisgruber’s own discussion of recent religious freedom cases provides a fine example.⁵² Though he says that the Court is “likely to represent the people better than Congress on questions of moral principle” such as the meaning of religious liberty,⁵³ the fact is that the majority opinion in *Employment Division v. Smith*⁵⁴ reveals no trace of focused moral argument about the nature of religious liberty—no trace, that is, of moral argument focused on the particular meaning or significance of religious liberty to particular people.⁵⁵ What happens in *Smith* is that Justice Scalia states the respondent’s contention about the meaning of religious freedom—that religious freedom means freedom of religious practice and worship even in relation to generally applicable laws (like narcotics laws) that are not targeted at religion⁵⁶—and then he answers it with the following arguments. He says first, “Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now.”⁵⁷

Now the last sentence here is hardly a focused moral argument. But Justice Scalia follows that display of naked resolution with an explanation:

51. EISGRUBER, *supra* note 3, at 173.

52. *See id.* at 199–202.

53. *Id.* at 201.

54. 494 U.S. 872 (1990).

55. Eisgruber’s discussion, *see* EISGRUBER, *supra* note 3, at 199–202, is mainly about *City of Boerne v. Flores*, 521 U.S. 507 (1997), which, among other things, defended the decision in *Smith* against the contrary conception of religious liberty in Congress’s 1993 Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb (1994). So far as focused moral argument about the nature of religious liberty is concerned, there is even less (if that were possible) in *Boerne* than there is in *Smith*.

56. *See Smith*, 494 U.S. at 878.

57. *Id.* at 882.

Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races. The First Amendment's protection of religious liberty does not require this.⁵⁸

I have my doubts whether this can be regarded as moral argumentation either. But if it is, it is nothing but a moral argument that holds the definition of religious liberty hostage to the general exigencies of the modern state. It does not betray any scintilla of special moral sensitivity that could not be found in any legislative, administrative, or policy debate. Certainly, one would look in vain to find any discussion of Alfred Smith's peculiar predicament or of the moral significance of what it is like to be a member of a minority religion such as the Native American Church. Mr. Smith and the Church are barely mentioned in the Court's opinion; they are simply hooks on which to hang a general argument (a general argument that is threadbare so far as any sort of moral consideration of the issue is concerned). Eisgruber himself acknowledges that the decisions in *Smith* and its progeny, *City of Boerne v. Flores*,⁵⁹ are mainly about the "catastrophe of misgovernance" that would result were the respondent's conception (or later Congress's conception) of religious freedom adopted, and he concedes that "Congress should avoid catastrophes of misgovernance" is not a discrete moral principle.⁶⁰ He says though that what entitles the Court to the final say on these matters is not its expertise on issues of governance but the fact that it is "likely to represent the people better than Congress on questions of moral principle."⁶¹ But we have just seen that there is no trace of moral prin-

58. *Id.* at 888–89 (citations omitted).

59. 521 U.S. 507 (1997).

60. EISGRUBER, *supra* note 3, at 201.

61. *Id.*

ciple in the Court's argument in these cases. And certainly if one were to bother consulting the Congressional record for the debates that preceded the passage of the Religious Freedom Restoration Act as a response to *Smith*,⁶² one will find a consideration of the moral issues that is incomparably more extensive and richer than the crudities of either Justice Scalia's opinion for the Court in *Smith* or Justice Kennedy's opinion for the Court in *Boerne*. (Too often, I think, the case for the moral superiority of courts over legislatures is made on the basis of preconceptions about what legislative debate must be like, rather than on the basis of actual acquaintance with the contents of the debates themselves.) Let me be clear: I am not saying that Congress is right and the Court wrong on these issues as a matter of constitutional law. The Court may well be right as a matter of legal doctrine and right as to a matter of administrative convenience. All I am saying is that the right of the Court to prevail in these circumstances in a disagreement with the legislature cannot possibly be based—as, in the last analysis, Eisgruber bases it—on the superiority of its *moral* arguments. The opinions of the Court are paragons perhaps of dense and complex doctrinal argument, and often they involve pyrotechnic displays of ill-temper on questions of interpretive strategy of the justices. But they are risible as examples of moral deliberation. And, although I cannot show this here, I believe this is true of most cases in which the Supreme Court has overturned legislation and that a fair-minded reader, studying any sample of recent Supreme Court decisions, would be hard put to find more than a few lines of focused moral argument in most of the majority opinions. We tell ourselves that the Court is a forum for focused and sustained moral argument. But it is a myth.

Oddly enough, there are places where Professor Eisgruber seems to recognize this. He says at one point: "Rarely do justices defend their decisions on the ground that they follow from the best understanding of some abstract political principle."⁶³ He acknowledges that they tend to shy away from arguments of political morality, and that they try instead to base their decisions on purely legal grounds:

Too often judges attempt to justify controversial rulings by citing ambiguous precedents, and too often judges veil their true reasons

62. A good place to begin is the intriguing debate about the application of RFRA to prisons. See 139 CONG. REC. S14, 461–70 (1993). This debate combines focused moral argument with issues of governance in a subtle and illuminating way that makes Justice Scalia's opinion for the Court in *Smith* look crude and impoverished by comparison.

63. EISGRUBER, *supra* note 3, at 109.

behind unilluminating formulae and quotations borrowed from previous cases.⁶⁴

....

... [J]udges ... often ... pretend that they are not making political judgments themselves, and that their decisions were forced upon them by textual details or historical facts.⁶⁵

He says that the effect of this is to "obfuscat[e] the public's understanding of what the Supreme Court is actually doing."⁶⁶ Now that seems to imply that the cases are *really* decided on moral grounds, but then those moral grounds are concealed behind a cloud of "technical jurisprudence"⁶⁷ in the opinions. So everything I said about the opinions in *Smith* and *Boerne* might be inconclusive: maybe in fact there *was* ample moral deliberation going on, only it is not presented in the opinion. I guess this would not be the first time students of the Court have expressed skepticism about whether the official written opinion in a case gives any reliable indication of the true grounds of the decision. Such skepticism was a staple of American legal realism. Jerome Frank, for example, said this about judicial opinions: "Daily, judges, in connection with their decisions, deliver so-called opinions in which they purport to set forth the bases of their conclusions. Yet you will study these opinions in vain to discover anything remotely resembling a statement of the actual judging process."⁶⁸

The realists used to say that judicial opinions are often deliberately or unconsciously misleading as to the true grounds for the decision: they often point the audience *away* from the facts that were most important to the judges in deciding as they did. Judges use terminology and appeal to theories, fictions and doctrines that are designed (in the words of Felix Cohen) "to dull lay understanding and criticism of what courts do in fact."⁶⁹ It's a familiar critique. But it is odd to find this sort of skepticism in Eisgruber's argument, particularly because one of the great advantages he cites in favor of the practice of judicial review is that judges—unlike legislators and voters—are "publicly accountable for their decisions."⁷⁰

They are not required to stand for election, but they must quite literally *give a public account* of their reasoning. As a result, their

64. *Id.* at 70.

65. *Id.* at 135.

66. *Id.*

67. *Id.* at 211.

68. JEROME FRANK, *LAW AND THE MODERN MIND* 111 (Anchor Books 1963) (1930).

69. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 816 (1935).

70. EISGRUBER, *supra* note 3, at 60.

reputation as a fair decision-maker is on the line when they rule. . . . [V]oters stand in a very different position. People vote in secret and without explanation.⁷¹

The contrast, in my view, is a little exaggerated. A Supreme Court justice can simply join a majority opinion with his vote, and provide no explanation of his own as to why he is doing so, or how this vote is consistent with other ways in which he in particular has ruled in other cases. But let that pass. My main point here is that the significance of this public reason-giving—which is supposed to distinguish judicial from non-judicial institutions, and give judicial institutions the edge when it comes to moral deliberation—is surely entirely nugatory if the reasons given are not reliable indicators of the grounds on which the decision was actually made. Professor Eisgruber pretends in his book to be a hard-headed pragmatist,⁷² basing his case for judicial review on how the world works, rather than on some abstract argument about democracy. But here—as elsewhere—he is reduced to a purely abstract argument. The requirement that judges give reasons for their decisions could, in principle, be a vehicle for moral reasoning and for assuring the public that moral issues are being decided on moral grounds. But, *in fact, it mostly isn't*; it is mostly a device for hiding the Court's decisions behind a cloud of technical jurisprudence.

Eisgruber also says that the tendency to stack up Supreme Court opinions with legalistic materials—precedents and arguments about how to interpret the text—“misleads the judges themselves” as to what they are supposed to be doing.⁷³ Judges, he says, ought to be “more honest with us, and with themselves” about the kinds of argument constitutional adjudication requires.⁷⁴ He writes as though the dominance of legal doctrine and hermeneutic argument thus were simply bad behavior on the judges' part. But it is not. It is a direct consequence of the fact that in most of their work, federal courts operate and are supposed to operate *as judicial institutions*. They are supposed to defer to the texts of enactments by other bodies, and so they are supposed to become expert in issues about textual interpretation; they are supposed to do justice by following precedent, and so they are supposed to become expert in manipulating doctrine. These are not aberrations in relation to most of the work done by the judiciary, and so there is something odd in Professor Eisgruber's tone of pained surprise when it turns out that these are the skills that the judges put

71. *Id.*

72. *See id.* at 20, 72.

73. *Id.* at 135.

74. *Id.*

on display in constitutional cases as well. If Eisgruber is right about what is required for good judgment in constitutional cases, then judges have to switch modes. They have to abandon their specifically judicial skills and take on the attributes of moralizing legislators, representatives whose task it is to subject legislation to the sort of moral scrutiny that voters and electors would subject it to, if only they were not vulnerable to the effects of electoral anxiety and naked self-interest. We should not be shocked if our judges find it difficult to do this. The difficulty is the direct product of assigning an essentially legislative task to what is mostly a judicial institution. So we return to the point on which I ended the previous section. Eisgruber may have shown that it is important that there be moral deliberation in our law-making process and that it is important that it be conducted by representatives who are insulated somehow from the vicissitudes and temptations of electoral politics. But he has not shown that it is a good idea to assign that role to a court, as opposed to (say) an unelected upper chamber. Judges have their own professional skills and ethos, and while it is true that those skills and that ethos make it unlikely that judges will decide cases on the basis of naked self-interest,⁷⁵ they do not make it likely that judges will decide constitutional cases on openly moral grounds.

III.

Why did Professor Eisgruber imagine the contrary? Why did he think that courts were more likely to serve the nation as a forum of moral principle than either elected or unelected legislative assemblies? The answer, I fear, has to do with a crude, misleading, and perennial antithesis, which one finds in almost every argument for judicial review, between *morality* and majoritarianism.

For Eisgruber, the antithesis is established as follows. "Democracy," he says, "is not the same thing as majoritarianism."⁷⁶ Majoritarianism is not government by the people, but government by a fraction of the people: it "permits 51 percent of the people to govern 100 percent of the time, and no presumption of fairness can attach to so imbalanced a result."⁷⁷

Suppose, for example, that a country is debating whether to spend tax dollars upon art museums or parks. Sixty percent of the population prefer museums, the remainder prefer parks. Would any-

75. *See id.* at 59.

76. *Id.* at 18.

77. *Id.* at 19.

body think it desirable, from the standpoint of democracy, if all the money went to pay for museums, and none for parks? Would anybody think it unfortunate, from the standpoint of democracy, if the country adopted a rule designed to ensure that tax dollars were shared among majority and minority interests? To qualify as democratic, a government must respond to the interests and opinions of all the people, rather than merely serving the majority. . . .⁷⁸

Eisgruber calls this ideal—of responsiveness to everyone’s interests and opinions—“*impartiality*,”⁷⁹ and we can see from his example how it requires a forms of sharing, rather than a winner-takes-all struggle by voting. On contested moral issues, however, “sharing” may not always be possible. “Consider a question such as whether abortion should be legal; what would it mean for a policy to share between majority and minority opinions on this issue?”⁸⁰ Instead he suggests that on contested moral issues, impartiality requires that they be decided on moral grounds (as opposed to mere self-interests) and that they be decided in a way that is sensitive to the best elements in each of the contestant moral positions.⁸¹ Understood in this way, impartiality is still opposed to majoritarianism, according to Eisgruber: “majoritarian resolution of moral issues is partial and therefore undemocratic.”⁸² That is why it is important to have non-majoritarian institutions in our democracy like the institution of judicial review. By virtue of the disinterestedness secured by their life tenure, judges are better positioned than legislators and voters to satisfy the demands of impartiality so far as important moral issues are concerned.

What is wrong with this picture? Leave aside the points developed in the previous section: that in fact judicial review doesn’t work like this. Suppose Justices Scalia, Kennedy, and all the others *did* make sophisticated moral arguments and that they *did* appeal to them as the basis of their decisions. What is wrong with the picture that contrasts this sort of politics with a politics dominated by majorities?

Well, for one thing, *the justices would still have to vote*. And there would still have to be a decision-rule such as *five votes defeat four* on the court, irrespective of what any justice thinks of the quality of any other

78. *Id.*

79. *Id.*

80. *Id.* at 54. In this regard, Professor Eisgruber cites Ronald Dworkin’s argument against “checkerboard solutions” to problems of this kind, such as the solution that abortion be permitted in some years and not others. *See id.* at 54, 223 n.23; RONALD DWORKIN, *LAW’S EMPIRE* 176–84 (1986).

81. *See* EISGRUBER, *supra* note 3, at 55–56.

82. *Id.* at 56.

justice's moral position. It is, in fact, an obvious misconception to contrast judicial review with majority rule. When the justices disagree, we count heads to ascertain a majority position. Judicial review embodies a form of majority-rule; on each decision, there is rule not by the judges as a whole but by a fraction of the judges—five ninths, or fifty-five per cent, or higher. I have labored this point before.⁸³ The difference between decisions by the court and decision by the federal legislature or by the electorate is not a difference in decision-procedure, it is difference in constituency: a constituency of nine, as opposed to voting constituencies numbered in the hundreds (in our legislatures) or in the millions (among the voters of the various states). Majority-rule is the one constant element in all these modes of political decision, the Supreme Court no less than the others.

Can Professor Eisgruber regard the majoritarian element in the Court's decision-procedures as an aberration, in the way that (as we saw in the previous section) he regards the Court's preoccupation with legal doctrine in constitutional cases? He certainly says very little about it,⁸⁴ and he offers no account at all of how we might think about it in relation to his conception of impartiality. But he really cannot treat it as an aberration. Once one acknowledges, as Eisgruber does, that moral issues are issues that reasonable people can disagree about in good faith,⁸⁵ and once one insists, as Eisgruber also does, that our means of dealing with moral issues must be a process of effective decision-making,⁸⁶ it follows that we must expect there to be disagreement among the judges and we must establish a procedure for determining in the last resort which of the moral views held by the various justices is to prevail.⁸⁷ One hopes, of course, that any vote will be preceded by

83. See WALDRON, *supra* note 2, at 26. For a fuller discussion, see Jeremy Waldron, *Deliberation, Disagreement and Voting*, in *DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS* 210, 215–25 (Harold Honju Koh & Ronald C. Slye eds., 1999).

84. The only references that I can find in Eisgruber's book to majority-decision on the Court are in the following two passages: "[F]ederal judges act alone or in small groups (in the case of Supreme Court justices, a group of nine). As a result, they reasonably believe that their vote matters a great deal to the outcome of a case. . . ." EISGRUBER, *supra* note 3, at 60. "It is simply too easy, especially in the Supreme Court, for judges to duck or override a precedent they do not like. 'Five votes' is a sufficient if not excellent answer to any argument of *stare decisis*." *Id.* at 70.

85. See *id.* at 47.

86. See *id.* at 84–85.

87. Professor Eisgruber argues that although political disagreements among the justices are inevitable and often correspond to differences between the political views of those who appointed them, still "they nevertheless differ from the kinds of disputes that are most common in the elected branches. They usually reflect real differences of political principle, rather than an effort to pander to voters, campaign for higher office, engineer an

deliberation, in which people respond to one another's arguments and adjust their positions accordingly. But again, it would be naive to assume that this by itself leads to consensus. Among the (modified) views that emerge from moral deliberation, there must be a way of choosing one of them to prevail for the time being. Think back to the earlier example about spending money on museums and parks. The country, says Eisgruber, should adopt "a rule designed to ensure that tax dollars [are] shared among majority and minority interests."⁸⁸ But suppose there is more than one such sharing proposal, or that more than one such sharing proposal survives good-hearted deliberation about fairness among the various factions. One of them must be settled upon, and there must be some procedure for doing that. Or think back to the example about abortion. A successful democracy, says Eisgruber, must ensure that moral issues like this are decided on the basis of moral reasons. But again that structure is not enough to determine a decision. We would expect any body that made a serious claim to represent the American people on this matter to include individuals with various moral positions about abortion backed up by moral reasons. There would still have to be a way of deciding among those positions. Professor Eisgruber implicitly acknowledges this, I think, when he talks of the winning side and the losing side in the proper resolution of a moral issue. But it is unfortunate, to say the least, that he says nothing about how the winners and losers are determined.

It is unfortunate because if he were to make explicit that the rule of majority-decision has a proper role to play in the resolution of moral disagreement, it would be much harder for him to cast aspersions on the use of majority-decision—exactly the same procedure—to decide moral issues among electors or in legislative assemblies. Instead of crude statements like "Majoritarianism . . . permits 51 percent of the people to govern 100 percent of the time,"⁸⁹ he would have to look more carefully at the actual juncture in electoral and legislative politics where the use of this decision-rule becomes necessary.⁹⁰ Reasonable people sometimes disagree in good faith about who they

interest-group deal, or honor a party platform." *Id.* at 4. But even if we accepted this account of differences in the origin of disagreements among justices and among legislators, there would *still* need to be a decision-procedure to settle the differences, no matter how high-minded they are.

88. *Id.* at 19.

89. *Id.*

90. See also ARENDT, *supra* note 31, at 164–65, for a useful distinction between majority-decision and majority-rule.

would like to represent them: eventually that matter might have to be decided, *using exactly the same decision-rule as the Supreme Court uses to decide moral issues*. Reasonable legislators often disagree in good faith about the merits of particular amendments or about the overall justice or social utility of a bill; and eventually those matters might have to be decided *using exactly the same decision-rule as the Supreme Court uses to decide moral issues*. These formulations would be more complicated, less catchy, than the slogans that Professor Eisgruber actually uses to discredit electoral or legislative majoritarianism; but I think they would afford more insight into the real issues that we face in designing a genuinely democratic and morally responsive political process.

I find this crude misuse of anti-majoritarian slogans particularly frustrating, because often in his book Professor Eisgruber is at pains to offer us a richer and more complicated picture. He accepts James Madison's point that you are not going to get domination (let alone tyranny) by stable and enduring majorities in a large republic like the United States.⁹¹ He says we should not let theoretical abstractions "deflect attention from the institutional machinery of government—elections, offices, procedures, jurisdictions, and powers."⁹² And in a footnote he says that he does "not mean to claim that the elected branches in fact behave in a 'majoritarian' fashion."⁹³ Their modes of behavior are much more complicated than this; they involve voting at various points, but those points are always embedded in a larger process that has many salient features other than vote-counting and majority-decision. Yet although these detailed acknowledgments are there, still in the end it is the crude antithesis between majority-rule (bad) and judicial review (good) that dominates Eisgruber's account. There is no acknowledgment that the processes of moral decision that he favors would have to involve majority-rule at some point, just as there is precious little acknowledgment that the "majoritarian" procedures he disfavors also accommodate substantial opportunities for reflection and moral deliberation.⁹⁴

91. See EISGRUBER, *supra* note 3, at 90 (citing THE FEDERALIST NO. 10, at 126–27 (James Madison) (Isaac Kramnick ed., 1987)). But Professor Eisgruber's acceptance of this point casts doubt on his suggestion that the small size of countries (such as New Zealand) may make judicial review less necessary, as a check on majorities, than in large countries like the United States. See EISGRUBER, *supra* note 3, at 76.

92. EISGRUBER, *supra* note 3, at 82.

93. *Id.* at 223 n.22.

94. But see his suggestion in a footnote that "[i]t is undoubtedly desirable and important for legislators to deliberate conscientiously about justice." *Id.* at 231 n.37. However, he goes on to say that it is very difficult for them to do this. Elsewhere he concedes that it is "possible that elected legislatures, whatever their flaws, are the institutions best able to re-

In the end, Eisgruber's case is based not on the decision-procedure that is used, but on the constituency of those whose votes are counted on a given issue. He has to fall back on the position that when we count judges' votes, we are more likely to be counting votes cast for reasons of moral principle, than we are when we count legislators' or elector's votes. On the judicial side of this comparison, we saw that his case rests mainly on the disinterestedness secured by life tenure. But as I argued at the end of section II, the most that that secures is that judges will not vote on the basis of self-interest; it does not secure that they will vote on specifically moral grounds, as opposed to other disinterested grounds (like legal grounds). On the popular side of the comparison, Eisgruber is convinced that ordinary citizens in the polling booth are always liable to vote their self-interest (and that therefore legislators who are electorally accountable to these voters are likely to pander to their interests as well). I want to finish by saying why I think this is implausible, particularly on the issues that tend to come before the Court.

Eisgruber says he does not believe that ordinary voters are either morally incompetent or uninterested in the moral dimension of political issues. He says his belief in democracy requires him to accept that ordinary citizens have what it takes, intellectually, to address important moral issues,⁹⁵ and that they will be affronted if important issues of principle are consigned to forums where they are unlikely to be decided on moral grounds.⁹⁶ Why then does he think they are unlikely to engage the moral capacities that he says ordinary voters have on issues on which he says they believe those capacities ought to be engaged? Why, despite the "parity of basic moral judgment,"⁹⁷ are ordinary voters so bad at morality, that they must be represented on these matters by people who are insulated from their approval or disapproval?

Given how much turns on it, Professor Eisgruber says surprisingly little to answer these questions. At the beginning of his book, he says that we should work on the basis of a complex rather than a simplistic account of the psychology of ordinary citizens:

present the American people with regard to the issues referred to in the Constitution." *Id.* at 52. He says, too, that although "[t]here is a risk that legislatures and electorates will represent the people badly on matters of principle, . . . a country might reasonably decide that the risk is worth bearing." *Id.* at 76.

95. *See id.* at 57–58.

96. *See id.* at 53.

97. *Id.* at 57.

People have views about how they ought to behave, and views about what they want or desire. These views sometimes tug in different directions. Our interests are not always in harmony with our values: we sometimes desire things that we ought not to have. Under these circumstances, most of us hope that we will be faithful to our values, not our interests; we hope, in other words, that we will do the right thing.⁹⁸

And later he takes the position that on moral matters ordinary people are always liable to the temptation to vote their pocketbook: "Few people are fortunate enough to be able to act on their moral convictions without fearing loss of income, property, or prestige."⁹⁹ Now I'm not sure what the evidence for this is supposed to be; none is mentioned. Eisgruber says that an individual citizen is more likely to vote on non-moral grounds when he or she votes "with the assurance that his or her ballot is unlikely to affect the outcome"¹⁰⁰ But why should this be? If my vote makes no difference, why would I be tempted by pocketbook considerations?

I am not even sure what "voting one's pocketbook" is supposed to mean on issues of the kind that would be allocated to the judiciary if Eisgruber's argument were accepted. I guess people are likely to vote their pocketbooks on issues about taxation and the economy—though even there we should have to say that some do and some don't. At any rate, these are the issues least likely to be moved from elective to non-elective institutions; even on Eisgruber's account, to the extent that they have a moral dimension they engage comprehensive moral principles of the sort that he acknowledges courts are incompetent to adjudicate.¹⁰¹ Eisgruber provides just one example of a discrete moral principle which might have a pocketbook dimension. "Remedying the effects of race discrimination, for example, can be expensive, and voters who might otherwise be exquisitely sensitive to the demands of racial equality can be led astray by an understandable concern about the size of their tax bill."¹⁰²

It's an odd example, though, because the relation between racial discrimination and property values an area dominated by legislation—the Civil Rights Act and the Fair Housing Act—rather than by the anti-legislative activity of the Supreme Court. Both in this area and in the area of affirmative action, voters and their representatives have

98. *Id.* at 5.

99. *Id.* at 60.

100. *Id.* at 61–62.

101. *See id.* at 169–73. *See also supra* text accompanying notes 46–51.

102. EISGRUBER, *supra* note 3, at 60.

managed to do quite well in remedying injustice, even at a certain social cost. Indeed, so far as affirmative action is concerned, the issue is not whether the Court will help us bear the sacrifices that the pursuit of equality requires; the issue is rather whether the Court will come to the aid of interested members of the majority who want to resist the demands of affirmative action. So that seems like an area where Eisgruber's position is simply perverse. In other areas, it is well nigh unintelligible. What would it be to "vote one's pocketbook" on, say, religious liberty or abortion? Citizens have strong views on these matters, certainly, but their views are strong because they engage their deepest values. And if we say they are just voting their preferences, all we are doing is blurring the very distinction—between people's interests and people's values—that Eisgruber puts so much weight on. I guess one could strain to find a fiscal dimension to religious liberty—certain conceptions of religious liberty might be administratively more expensive than others. But here it is remarkable that it was the Supreme Court that seized on this point; the people and their representatives seemed to want to go the other way!¹⁰³

Eisgruber quickly retreats from this point. He concedes that voters often "care more deeply about moral issues than about their economic self-interests."¹⁰⁴ But he says they care about the moral issues in the wrong sort of way. They may say, for example, that they want "to vote for a candidate dedicated to the proposition that all human life is sacred,"¹⁰⁵ but what they really want to do is *stick it to opposing cultural groups*, by sending a message about the power and prestige of the pro-life movement.¹⁰⁶ He admits that it is difficult to tell the difference between a genuine pro-life morality and their sort of participation in the culture-wars; pro-life voters may not even be conscious that they intend to vote in this way. But still that may be what's happening: "concerns about cultural prestige may taint voters' judgment even if they recognize that it would be wrong to cast their vote on that basis."¹⁰⁷

I must say that I find this remarkably uncharitable as an account of voters' motivations. And once again, I should like to see the evidence, if there is any, and to hear argument why, in the absence of evidence, we are supposed to simply assume that voters' decisions will

103. See discussion *supra* accompanying notes 52–62.

104. EISGRUBER, *supra* note 3, at 60–61.

105. *Id.* at 61.

106. See *id.*

107. *Id.*

be tainted in this way. Be that as it may, it is an extraordinarily shaky basis on which to rest the argument for judicial review. Eisgruber is honest enough to acknowledge the possibility that the moral judgments of members of the judiciary are often tainted in exactly the same way.¹⁰⁸ Certainly judicial appointments are routinely presented as battles in the culture wars, and in areas like abortion (and perhaps too in capital punishment), the justices often accuse one another of displaying moral and cultural muscle in their opinions, rather than arguing on the basis of the reasons that ought to prevail in these cases. "Ideally," says Eisgruber,

we should hope that justices have a kind of "grand disinterestedness": they should be contemplative and flexible rather than fanatical or dogmatic, and they should have enough integrity to pursue moral intuitions even when those intuitions lead them to question positions they have held and political affiliations they have cherished.¹⁰⁹

Ideally, I guess, that will be true of legislators and ordinary voters as well. But Eisgruber is not willing to pursue his idealism in that direction. He says "we should not predicate our assessment of judicial competence upon the assumption that presidents will appoint especially bad justices."¹¹⁰ But he does predicate his case for judicial review upon the assumption that ordinary voters will be unable to distinguish voting on a moral issue from participating in the culture wars. He closes this part of his argument by saying that "[t]he kind of disinterestedness that flows from life tenure" gives judges an edge in this regard.¹¹¹ But there is no reason to think that disinterestedness flowing from life tenure will have any impact at all on one's propensity to engage in the cultural wars. Earlier—in section II—we saw that there is no reason to correlate the disinterestedness that flows from life tenure with a propensity to decide cases on moral rather than legalistic grounds. Now we see that it has no correlation with one's ability to make the right sort of moral judgment. The conditions of judicial appointment and tenure were supposed to be the key to Eisgruber's defense of the power of the courts in the American system. But all they do is deepen our puzzlement about this peculiar kind of "democratic" arrangement.

108. *See id.* at 63–64.

109. *Id.* at 64.

110. *Id.*

111. *Id.*